No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

NATHAN Z. DERSHOWITZ
Attorney for the Amicus Curiae American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

VICTORIA B. EIGER
Of Counsel

QUESTION PRESENTED

Is a governmental system of unemployment compensation under which "churches" are exempt from coverage, but "church-related schools" are not, consistent with the mandates of the Religion Clauses of the First Amendment?

No. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY, Petitioners,

v.

THE STATE OF SOUTH DAKOTA, Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

Motion For Leave To File Brief Amicus Curiae

The undersigned, as counsel for the American Jewish Congress, respectfully moves this Court for leave to file the

accompanying brief amicus curiae in support of the petitioners. Pursuant to Rules 36 and 42, the parties' consent to the filing of the attached brief was sought. Counsel for petitioners consented to the filing of the brief, but counsel for respondent, The State of South Dakota, refused to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918. Among its major concerns are the preservation and protection of the unitary freedoms secured by the Free Exercise and Establishment Clauses of the Constitution of the United States. We seek permission to file this brief because we believe that the decision of the Supreme Court of South Dakota fundamentally undermines the values inherent in, and the

protections afforded by, the Religion Clauses of the Constitution.

The American Jewish Congress has participated in a large number of church-state cases before this and other courts. It believes that its deep commitment to the First Amendment and its accumulated experience in this field permits it to make a unique contribution to the discussion of the Constitutional issues involved in this case.

Respectfully submitted,

Nathan Z. Dershowitz
Attorney for the Amicus Curiae
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

TABLE OF CONTENTS

Question Presented	1
Decisions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	6
Argument	15
Conclusion	33

TABLE OF AUTHORITIES

Statutes

26 U.S.C. § 3309	passim
S.D. Compiled Laws Ann. §61-1-10.4	passim

Cases

Appeal of Stark, 72 Pa. D. & C. 168 (1950)	25

Beit Havurah v. Zoning Board of Appeals, 177 Conn. 440, 481 A.2d 82 (1979) 32

Matter of Community Synagogue v. Bates, 1 N.Y.2d 445, 154 N.Y. Supp. 2d 15, 136 N.E.2d 488 (1956) 31

Meek v. Pittenger, 421 U.S. 349 (1975) 19

National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 17

State of Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980) 16

Tilton v. Richardson, 403 U.S. 672 (1971) 20

Twin City Bible Church v. Zoning Board of Appeals, 50 Ill. App.3d 924, 8 Ill. Dec. 919, 365 N.E.2d 1381 (1977) 32

Walz v. Tax Commission, 397 U.S. 664 (1970) 21

Wolman v. Walter, 433 U.S. 229 (1977) 20

Other Authorities

Annot., "What Constitutes 'Church,' 'Religious Use,' or the Like Within Zoning Ordinance," 62 A.L.R. 3d 197 (1975) 32

No. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY, Petitioners,

v.

THE STATE OF SOUTH DAKOTA, Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

Brief of The American Jewish Congress, Amicus Curiae

QUESTION PRESENTED

Is a governmental system of

unemployment compensation under which "churches" are exempt from coverage, but "church-related schools" are not, consistent with the mandates of the Religion Clauses of the First Amendment?

DECISIONS BELOW

The opinion of the Supreme Court of South Dakota, reported at 290 N.W.2d 845 (S.D. 1980), appears in the Appendix, (Appendix A, pp. A1-A24). The opinion of the Circuit Court, Sixth Judicial Circuit of South Dakota, not reported, appears in the Appendix (Appendix B, pp. A25-A34). The opinion of the hearing officer for the South Dakota Department of Labor Unemployment Insurance Division, not reported, also appears in the Appendix (Appendix C, pp. A35-A45).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 26, 1980. A timely petition for rehearing was denied by oral order on May 2, 1980. Certiorari was granted on November 3, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The relevant provisions of 26 U.S.C. § 3309(a) (1970), as it existed

prior to the Unemployment Compensation Amendment Act of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2670, which in effect, repealed Sec. 3309(a)(3) (1970), are as follows:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.
>
> (3) in the employ of a school which is not an institution of higher education.

The relevant provisions of the South Dakota statutes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4(3) are as follows:

> (1) In the employ of
>
> (a) a church or convention or association of churches, or
>
> (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or
>
> (2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the

> exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education;
> ....

Statement of the Case

Petitioners St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy seek reversal of the decision of the South Dakota Supreme Court holding Northwestern Lutheran Academy ("Lutheran Academy") and St. Martin's Evangelical Lutheran School ("St. Martin's School") liable for payment of unemployment compensation taxes.

Before January 1, 1978, Section 3309(b) of the Federal Unemployment Tax Act ("FUTA") permitted states to exempt

certain services from unemployment compensation taxation. These exemptions were codified in a parallel state law, South Dakota's Sec. 61-1-10.4, which provided that covered employment did not include services performed:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or

> licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education; ....

In 1976 Congress amended FUTA, P.L. 94-566, to eliminate the subsection (3) exemption, and, as required by that amendment, South Dakota in effect repealed subsection (3) of SDCL 61-1-10.4. The remainder of SDCL 61-1-10.4 remained intact.

In April, 1978, the Secretary of Labor determined that, in light of the repeal of § 3309(b)(3), church-related schools were not exempt from state unemployment tax. According to the Secretary, the repeal by Congress of the Section

3309(b)(3) exclusion was clearly intended to result in State coverage of church related schools. In his view, the only services performed in the schools that might reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their church responsibilities within the school.

The Secretary's opinion resulted in a directive issued to the states requiring them to assess unemployment compensation taxes against church-related schools. In order to continue its participation in FUTA, the State of South Dakota issued a determination that both the Lutheran Academy and St. Martin's School were employers subject to coverage by the South Dakota

unemployment insurance law. The petitioners appealed.

An Appeals Referee found that petitioners are members of the Wisconsin Evangelical Lutheran Synod. The Synod's purpose is to "extend and conserve the true doctrine and practice of the Evangelical Lutheran Church." One of its means for accomplishing this purpose is the establish[ment] and maint[enance of] theological seminaries, colleges, academies, schools and other institutions." According to the Synod, the training of youth involves both education and religion and, according to the Synod, the two are so closely intertwined that they are inseparable. School programs are operated in accordance with these beliefs.

St. Martin's School is operated by

St. Martin Evangelical Lutheran Church, a member of the Synod. The school is state certified and offers education in kindergarten through the eighth grade. Overall supervision over the school is exercised by a Board of Education elected from and by the local congregation. The school is wholly financed by this local congregation and is not a separate entity from the church. Its paid staff includes two male teachers, considered ministers by the Synod; four female teachers, also deemed part of the ministry by the Synod but, unlike the males, barred from taking part in sacerdotal functions and from voting on Synod matters; as well as three other employees, one of whom also works at St. Martin Evangelical Lutheran Church. All education courses offered at St.

Martin's School are taught from a religious viewpoint based on the scriptural convictions of the Wisconsin Evangelical Lutheran Synod.

Northwestern Lutheran Academy is one of four academies maintained by the Synod to provide secondary education to individuals who intend to enter the Church's ministry. The Synod not only is the Academy's principal source of financial support, but controls its operation and policy. The Academy has two goals -- to recruit and train prospective workers in the preaching and teaching ministry and to make available a Christian education on the secondary level. Approximately 46 percent of its graduates become teachers or pastors. Courses offered at the Academy are also taught from a religious viewpoint.

Nevertheless, the Appeals Referee concluded that, while the Academy and St. Martin's School are operated, supervised, controlled, and principally supported by a church or convention of churches, their primary purpose is education, not religion, and, thus, they are not exempt from FUTA coverage. He further determined that pastors performing services in the church schools, as well as the school's male teachers, were exempt from coverage under the statutory provision, SDCL 61-1-10.4(2), exempting any duly ordained, commissioned or licensed minister of the church in the exercise of his ministry. Because female teachers were not vested by the Synod with ministerial status, their services were held not exempt. The Referee rejected the school's claim that their inclusion in the

unemployment compensation scheme unconstitutionally entangled church and state.

The Circuit Court of the Sixth Judicial District, Hughes County, reversed. It held that SDCL 61-1-10.4(b)(1), exempting services performed in the employ of an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church, rendered the schools exempt from taxation and that Congress' repeal of the subsection (3) exemption for non-public schools did not affect the "primarily for religious purposes" exemption. The court did not reach the constitutional question.

The Supreme Court of South Dakota again reversed, one justice dissenting. It ruled that Congress, in repealing the

exclusion from unemployment compensation taxes for private schools intended to include church-related schools within the scope of the Act. The court held that the Secretary's interpretation was consistent with Congressional intent, and that, whatever burdens were placed on parochial schools were justified by compelling governmental interests. It held, in addition, that the statute did not unduly entangle church and state. Finally, it held that, while the school's male teachers were exempt, the female teachers were not.

Argument

A GOVERNMENTAL SYSTEM OF UNEMPLOYMENT COMPENSATION UNDER WHICH "CHURCHES" ARE EXEMPT FROM COVERAGE, BUT "CHURCH-RELATED SCHOOLS" ARE NOT, IS INCONSISTENT WITH THE MANDATES OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The American Jewish Congress believes that the plain language of the statutory provision exempting from FUTA coverage all organizations operated primarily for religious purposes which are operated, supervised, controlled or principally supported by a church or convention or association of churches exempts the petitioners and all other church-related schools from the Act's coverage. Since the language is clear, no resort to Congressional intent need be had. See State of Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980).

Alternatively, if this Court finds the statutory language ambiguous, we suggest that, since Congress was silent as to its intention to include or exclude church-related schools within the coverage of

FUTA, and since inclusion presents a "significant risk" that the First Amendment's entanglement bar will be breached, National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), this Court should construe the Act to exclude religious schools and thereby avoid the sensitive First Amendment issues which would otherwise arise.

But, if this Court should reject those two claims, then the American Jewish Congress respectfully urges that the statutory scheme be declared unconstitutional.

Our theory of unconstitutionality is a simple one. We believe that Congress might, consistent with the First Amendment, impose unemployment tax liability on all religious institutions, including churches (qua houses of worship) and church-related

schools. If such a scheme were enacted, the costs and burdens imposed on religious institutions, we believe, would be justified by the compelling governmental interest in providing financial assistance to those who are unemployed through no fault of their own. So long as it were administered so as to minimize governmental entanglement in church affairs, a statutory compensation scheme which included both churches and church schools within its ambit would be constitutional.

But this is not the unemployment compensation scheme with which this Court is faced. "Churches" are unequivocally excluded from coverage. Having decided to exclude churches from FUTA coverage, Congress may not then mandate inclusion of church-related elementary and secondary

schools. The First Amendment will not tolerate the drawing of that line, for the attempt to distinguish between the two necessarily leads to excessive entanglement.

The decisions of this Court consistently and correctly recognize that church-related primary and secondary schools are an integral part of the church. This Court, in Meek v. Pittenger, 421 U.S. 349, 366 (1975), in striking down state funds for certain auxiliary services in church-related elementary and secondary schools, described the relationship succinctly:

> The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious

> education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See Lemon v. Kurtzman, 403 U.S., at 616-617, 91 S.Ct., at 2113.... "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." Id. at 657, 91 S.Ct., at 2133 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689.

Justice Stevens, concurring and dissenting in Wolman v. Walter, 433 U.S. 229, 265 (1977), quoted the language set out above while observing that a sectarian school's mission "at heart is religious" and "the sectarian school itself, not the legislation ... is 'entangled with religion.'" See also Tilton v. Richardson, 403 U.S. 672 (1971) (recognizing signifi-

cant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools).

Religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative, if not dominant policy of church schools." Walz v. Tax Commission, 397 U.S. 664 (1970). Under these circumstances, the distinction between a church and a church-related school is a wholly improper one. The factual record in this case bears this out completely.

As set forth in greater detail in the Statement of the Case, St. Martin Evangelical Lutheran Church, of which St.

Martin's School is a part, and the Lutheran Academy are members of the Wisconsin Evangelical Lutheran Synod. The Synod's purpose is to extend and conserve the true doctrine of the Evangelical Lutheran Church. It does so, in part, through the establishment and operation of schools, the existence of which rests on a theological base and the operation of which is in accord with that theological base. School programs are operated in accordance with those religious beliefs and educational courses are taught from a religious viewpoint. The teachers at St. Martin's School and the Lutheran Academy, both male and female, are deemed by the church to be members of its ministry.

The close relationship between the schools and the "church" -- indeed the

identity between the schools and the church which makes the attempted description of them as separate entities impossibly circular (one being necessarily defined in terms of the other) -- is not unique to Evangelical Lutheran institutions. The relationship between "church" and church-related schools in other denominations is similarly intertwined. A few examples will suffice to make this clear.

> Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3-5% of the lay teachers are non-Catholic. Teachers are

employed by the principal and parish priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and pastor, are subject to discharge for breach of religious doctrine and must be members of the church.

United States Department of Labor v. State of Alabama, Recommended Decision of William A. Gershuny, ALJ, Joint Appendix, A-19, A-25.

In short, these schools are a ministry of the church. They are part of the church and inseparable from it. And the Constitution requires that the government recognize this identity.

The First Amendment requires that the term "church" be given the most inclusive and all-embracing definition. In Appeal of Stark, 72 Pa. D. & C. 168 (1950), a case involving a religious order's claim of entitlement to an occupancy permit allowing it to use one of its buildings as sleeping quarters for retreatants, those opposing the granting of the permit contended that the building, if used that way,

was not a church within the meaning of the zoning ordinance. The court rejected the contention, stating that the ordinance would be constitutional only if the term "church" were defined broadly:

> It is not within our province to define what is or is not a church. The framers of the ... ordinance wisely omitted to supply such a definition. What may be a sacred religious building to one denomination or religious sect may not meet the test of another denomination or group. We could define a "church" as a "building set apart for public worship," or "a place of worship of any religion" (Webster's New International Dictionary, 2nd ed.), or could quote the definition contained in canon 1161 of the Roman Catholic Church as "a sacred edifice dedicated to divine worship, especially with a view to enabling all the faithful to practice public worship."
>
> Justice Frankfurter in his dissent in West Virginia State Board of Education et al. v.

> Barnette et al., 319 U.S. 624, says "it is unnecessary to attempt a definition of religion." We believe that such a definition -- if, as the term would indicate, it is to be a definitive delineation and is to control our future decisions -- would be harmful and a danger to religious freedom.

Id. at 179-80.

The artificiality and unworkability of the attempted distinction between church and church school is highlighted by the peculiar result reached by the Supreme Court of South Dakota in this case with respect to the exemption of male, but not female, teachers at St. Martin's School and at the Lutheran Academy. Section 3309(b)(2), corresponding to SDCL 61-1-10.4(2), exempts from coverage services performed "by a duly ordained, commissioned, or licensed minister of a church in the

exercise of his ministry." In the instant case, petitioners maintained, and the Appeals Referee found as fact, that male and female teachers are considered part of the church's ministry. Nevertheless, because under church doctrine male teachers, but not female teachers, may perform sacerdotal functions and vote on Synod matters, all of the schools' male teachers were ruled exempt from coverage under the "minister" exception of 3309(b)(2). A "church" which is organized slightly differently and which makes no sex-based distinctions among members of its ministry would, under this rule, have all of its teaching employees exempt from FUTA coverage. The operation of the rule, turning as it does solely on the particularities of a church's doctrinal precepts, definition of its ministry and

assignment of particular roles -- all of which are fundamentally religious -- to its members makes manifest the strained and artificial nature of any attempt by the state to dissect a church and to fit its pieces into nice categories.

The highly artificial distinction the Secretary's interpretation seeks to impose is even more clearly shown by focusing on the Section 3309(b)(1) exemption which, in the church-related school context, according to the Secretary, excludes from covered services "strictly church duties performed by church employees at the schools pursuant to their church responsibilities." What is the church -- the Evangelical Lutheran Church, the Synod, St. Martin Evangelical Church? If "church" as used here means "house of worship," as the

Secretary and the Supreme Court of South Dakota appear to suggest, it is difficult to make any sense out of the Secretary's interpretation. Under that test, St. Martin Evangelical Church is probably a "church," but what about the Synod, which runs the Lutheran Academy or the "Evangelical Lutheran Church." What, indeed, is a strictly "house of worship" duty? What is a "house of worship" responsibility performed at a school? Who is a "church" employee, as opposed to a school employee, when the "church" and the "school," like St. Martin's School and St. Martin Evangelical Lutheran Church are not separate entities? When is a duty performed at the school, and not at the church, when, as is often the case, the "church and the school are housed in the same building?

The only way sense can be made of this provision is by recognizing the wholeness and integrity of the church in its largest sense, as a community of worshippers carrying out a perceived religious mission through a variety of ministries, often including educational ones.

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer or sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer.... To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself.

Matter of Community Synagogue v. Bates, 1 N.Y.2d. 445, 453, 154 N.Y.S.2d 15, 21-22, 136 N.E.2d 488, 493 (1956). See also

Twin City Bible Church v. Zoning Board of Appeals, 50 Ill. App. 3d 924, 8 Ill. Dec. 919, 365 N.E.2d 1381 (1977); Beit Havurah v. Zoning Board of Appeals, 177 Conn. 440, 481 A.2d 82 (1979); Annot., "What Constitutes 'Church,' 'Religious Use,' or the Like Within Zoning Ordinance," 62 A.L.R.3d 197 (1975). A church is not merely a house of worship. And a church-school is not something apart from the church, but rather a part of it.

Any other reading necessarily treats religious organizations on the basis of artificial and arbitrary lines drawn according to preconceived notions of what a church is, how it should be structured, and how it should define and pursue its mission. That the Constitution does not countenance.

Conclusion

For the reasons set forth above, the American Jewish Congress, amicus curiae, respectfully urges that, if this Court determines that the statutory scheme exempts "churches" but includes church-related schools, the Court declare the statute unconstitutional, as violative of the Religion Clauses of the First Amendment.

Respectfully submitted,

Nathan Z. Dershowitz
Attorney for the
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

Victoria B. Eiger,
Of Counsel

New York, New York
December 1980